IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ADAM O. FOSTER,

Defendant and Appellant.

B206146

Los Angeles County Superior Court No. BA328916
The Honorable Charles F. Palmer, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

YUN K. LEE
Deputy Attorney General

SUSAN S. KIM
Deputy Attorney General
State Bar No. 199519

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 620-6449
Fax: (213) 897-6496

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ADAM O. FOSTER,** Defendant and Appellant.	B206146

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, appellant was charged in count 1 with theft (Pen. Code,[1/] § 484e, subd. (d)), in count 2 with the misdemeanor of possession of a smoking device (Health & Saf. Code, § 11364, subd. (a)), and in count 3 with receiving stolen property (§ 496, subd. (a)). As to count 1, it was alleged that appellant had served five prior prison terms, two for possession of a controlled substance (Health & Saf. Code, §§ 11350, 11377), one for possession or purchase for sale of a controlled substance (Health & Saf. Code, § 11351), one for unlawful driving or taking of a vehicle (Veh. Code, § 10851), and one for burglary (§ 459), within the meaning of section 667.5, subdivision (b). (1CT 41-44.) Appellant initially pleaded not guilty and denied the special allegations. (1CT 45.)

After a hearing regarding appellant's section 1538.5 motion, the motion was denied. (1CT 106-107.) After appellant was advised of and waived his constitutional rights, he withdrew his previous not guilty plea and pleaded no contest to count 1. (1CT 108-109; see 1RT 25-29.)

---

1. All further statutory references will be to the Penal Code, unless otherwise indicated.

Probation was denied, and appellant was sentenced in count 1 to the low term of 16 months in state prison. The remaining counts and allegations were dismissed pursuant to section 1385. Appellant was given credit for 222 days of presentence custody, consisting of 148 actual days and 74 days of good time/work time. Appellant was ordered to pay a $200 restitution fine (§ 1202.4, subd. (b)) and a $20 court security assessment (§ 1465.8, subd. (a)(1)). A $200 parole restitution fine (§ 1202.45) was imposed and stayed. (1CT 109-111; see 1RT 29-31.)

Appellant appeals the ruling rendered on his section 1538.5 motion. (1CT 112.)

STATEMENT OF FACTS[2/]

On August 9, 2007, police officers were driving their vehicle when they saw appellant riding his bicycle without a bicycle light during the hours of darkness, in violation of Vehicle Code section 21201, subdivision (d)(1). The officers conducted a pedestrian stop in order to issue a citation. After the officers spoke with appellant, appellant stated that he had a "pipe," "street vernacular for crack pipe" that is "commonly used to inhale rock cocaine." Appellant was detained pending further investigation. Incident to arrest, an officer removed, from appellant's left front pants pocket, six different credit cards with different individuals' names and a California driver's license in another individual's name. Appellant had credit cards and a driver's license belonging to Adam Parson, Hannah Douglas, Robert Murdoch, C. de Haaf, and R. Leticia. Appellant was arrested. When the officers later spoke with de Haaf,

---

2. Since appellant pleaded no contest, the Statement of Facts is taken from appellant's probation report. (See 1CT 113-122.)

she stated that her wallet had been stolen on May 21, 2007, from her husband's hospital room at the Irvine Regional Hospital. (See 1CT 113.)[3/]

3. At the suppression hearing, Los Angeles Police Officer Fred Williams testified that appellant was stopped for riding his bicycle during hours of darkness without a bicycle light. Before Officer Williams's partner conducted a patdown search of appellant, appellant indicated that he had a "pipe." The partner recovered the pipe from appellant's pocket, and appellant was arrested for the pipe. After his arrest, Officer Williams searched appellant and recovered six credit cards and one identification card. (See 1RT 2-7; see also Argument I, A.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S SUPPRESSION MOTION

Appellant contends that contrary to the superior court's opinion, this was not a "close case," and given the utter lack of reasonable suspicion that appellant was armed, the evidence clearly should have been suppressed as the fruit of an unconstitutional patdown search. (AOB 5-17.) Respondent submits that the trial court properly denied appellant's suppression motion.

A. Factual Background

On December 31, 2007, appellant filed a motion to suppress evidence pursuant to section 1538.5. (1CT 102-104.) On January 9, 2008, a hearing was held regarding appellant's suppression motion pursuant to section 1538.5.[4/] (See 1RT 1-20; see also 1CT 106.)

Los Angeles Police Officer Fred Williams testified at the suppression hearing as follows: On August 9, 2007, at 1:30 a.m., Officer Williams saw appellant riding a bicycle without a bicycle light during hours of darkness, which was a violation of Vehicle Code section 21201. (1RT 2-3, 7.) It was dark at that time. (1RT 3.) Officer Williams conducted a stop in order to issue a citation for the Vehicle Code violation. (1RT 3-4.) The stop was conducted at a gas station, which was operating with its lights on. (1RT 8-10.) Officer Williams asked appellant to dismount the bicycle. (1RT 4, 10.) At that point, Officer Williams's partner "went to make contact with [appellant] and conduct a pat-down search" "[f]or officer safety." (1RT 4.) The search was necessary because of "the area of the stop, the time of day, and the clothing that [appellant] was wearing at the time was very baggy which could be used to conceal a

4. It was stipulated that there was no warrant. (1RT 1.)

weapon." (1RT 4; see 1RT 12-14.) "That particular area, F[l]orence and Normandie, has lot of violent crimes, property crimes." (1RT 4.) Officer Williams was aware that the area around Florence and Normandie was a high crime area for violent crime because he had worked on patrol in that area for approximately a year and three months and had also grown up in that area. (1RT 4-5.)

Officer Williams's partner conducted the patdown search of appellant. (1RT 5, 11.) Prior to conducting the patdown search, Officer Williams's partner asked appellant whether appellant had "anything on him that could poke him or stick him." (1RT 5.) Appellant replied, "[Y]es I have a pipe in my pocket." (1RT 5.) After appellant indicated that he had a pipe in his pocket, Officer Williams's partner removed the pipe from appellant's pocket. Based on his training and experience, Officer Williams was aware that "pipe" meant a "crack pipe." (1RT 5-6.)

Then, Officer Williams's partner ran appellant for wants and warrants. Officer Williams took custody of appellant. (1RT 6.) Appellant was arrested for the pipe. (1RT 7.) After appellant was arrested for the pipe, Officer Williams searched appellant and removed, from appellant's right pocket, six credit cards with different names on them and one identification card. (1RT 6-7.)

After hearing arguments by the prosecutor (1RT 15, 18-19) and defense counsel (1RT 15-18), the trial court took the matter under submission (1RT 20).

On January 10, 2008, after hearing additional arguments by defense counsel (1RT 21-22), the trial court denied appellant's section 1538.5 motion, explaining:

> I have had an opportunity to read the *Dickey* case [*People v. Dickey* (1994) 21 Cal.App.4th 952]. And through additional looking,

this is a close case. But I do find there are sufficient differences between the *Dickey* case and this case, and there were sufficient articulable reasons to justify the pat-down for officer safety. [¶] Officer Williams testified that [appellant] was patted down because of the time of day which was 1:30 a.m. The area of the stop which was Florence and Normandie, which he testified he knew from personal experience both as an officer having patrolled there and having grown up in the area, that it was an area in which there were a lot violent crimes and property crimes. [Appellant] was wearing baggy clothes which could conceal a weapon. [¶] As I indicated, I think it's close. But I do think that there were sufficient articulable reasons to justify the pat-down; in particular, the time of day and the location were significantly different than they were in *Dickey*. Maybe the Court of Appeal will come to a different conclusion.

(1RT 22-23; see 1CT 107.)

B. Relevant Law

In reviewing a trial court's denial of a suppression motion pursuant to section 1538.5, an appellate court views the record in the light most favorable to the trial court's ruling, deferring to express or implied factual findings supported by substantial evidence. The appellate court independently reviews the trial court's application of the law to the facts. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969; *People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Glaser* (1995) 11 Cal.4th 354, 362; see *Ornelas v. United States* (1996) 517 U.S. 690, 696-698 [116 S.Ct. 1657, 134 L.Ed.2d 911].) "'[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court.'" (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, citation omitted; *People v. Bowers* (2004) 117 Cal.App.4th 1261, 1271.)

An officer may conduct a patdown search for weapons upon detaining a person if he has "a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." (*Michigan v. Long* (1983) 463 U.S. 1032, 1049 [103 S.Ct. 3469, 77 L.Ed.2d 1201], fn. omitted; *Terry v. Ohio* (1968) 392 U.S. 1, 21 [88 S.Ct. 1868, 20 L.Ed.2d 889]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240-1243.) "'The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' [Citation.]" (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230, citing *Terry v. Ohio*, *supra*, 392 U.S. at p. 27.)

> The judiciary should not lightly second-guess a police officer's decision to perform a patdown search for officer safety. The lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations.

(*People v. Dickey* (1994) 21 Cal.App.4th 952, 957, citations omitted; see also *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110 [98 S.Ct. 330, 54 L.Ed.2d 331] ["We think it too plain for argument that the State's proffered justification - the safety of the officer - is both legitimate and weighty."]; *People v. Wilson* (1997) 59 Cal.App.4th 1053, 1061 ["Fourth Amendment exclusionary rule is not to be interpreted so as to endanger police officers in the responsible performance of their duties."].)

C. The Trial Court Properly Denied Appellant's Suppression Motion

In the instant case, Officer Williams testified at the suppression hearing that his partner patted down appellant for officer safety reasons, specifically because of the high crime area of the stop, the late time of day

(1:30 a.m.), and appellant's baggy clothing which could be concealing a weapon. (See 1RT 4-5.) As stated in *People v. Avila* (1997) 58 Cal.App.4th 1069,

> All of these factors, although perhaps individually harmless, could reasonably combine to create fear in a detaining officer. The *Terry* test does not look to the individual details in its search for a reasonable belief that one's safety is in danger; rather it looks to the "totality of the circumstances." [Citation.]

(*Id.* at p. 1074, citing *Terry v. Ohio*, *supra*, 392 U.S. at p. 27; see also *People v. Arvizu* (2002) 534 U.S. 266, 274-275 [122 S.Ct. 744, 151 L.Ed.2d 740] [disapproving of Ninth Circuit's "divide-and-conquer analysis" of rejecting "seven of the listed factors in isolation from each other" rather than taking into account the "'totality of the circumstances'" as explained in *Terry v. Ohio*].)

Both the high crime area and the late hour (1:30 a.m.) were factors that can combine to create fear in a detaining officer. (See *People v. Limon* (1993) 17 Cal.App.4th 524, 534, citations and quotation marks omitted ["The connection between weapons and an area can provide further justification for a pat-search. . . . [T]hat an area involved increased gang activity may be considered if it is relevant to an officer's belief the detainee is armed and dangerous. While this factor alone may not justify a weapon search, combined with additional factors it may."]; see *In re Frank V.*, *supra*, 233 Cal.App.3d at p. 1241 [finding patdown lawful where "the officers were in a gang neighborhood at night and confronting two persons whom they recently had observed leaving from the curb of a known gang house, one wearing a heavy coat with his hands in his pockets."]; see also *People v. Souza* (1994) 9 Cal.4th 224, 240 ["An area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment. [Citations.]"] & *id.* at p. 241 ["The time of night is

another pertinent factor in assessing the validity of a detention."];[5] but see *People v. Medina*, *supra*, 110 Cal.App.4th at p. 178 ["Because the decision to restrain [the defendant's] hands and search him was based solely on his presence in a high crime area late at night, both the detention and the search were unlawful."].)

In addition to these factors of the high crime area and the late hour, there was the additional factor that appellant was wearing baggy clothing which could conceal a weapon. This factor of baggy clothing was a factor that, in combination with the other factors mentioned above, can combine to create fear in a detaining officer. (See *People v. Collier* (2008) __ Cal.Rptr.3d __, 2008 WL 4257133 at *1, fn. 1 ["The female driver was wearing tight-fitting clothing and was not patted down for weapons. Had [the defendant] been wearing nonbaggy clothing, we doubt that Deputy Binder would have entertained a suspicion that [the defendant] might be armed. Our opinion should not be read as allowing the police carte blanche to pat down anyone wearing baggy clothing. But the wearing of baggy clothing, coupled with other suspicious circumstances, here being in a car which reeks of marijuana, furnish the requisite facts to support a pat-down for weapons so that the search of the car could be safety performed."]; *People v. Lopez* (2004) 119 Cal.App.4th 132, 137 [concluding that detention and patdown were reasonable under the totality of the circumstances, which included the factor that the defendant was wearing loose, baggy pants].) Thus, in the instant case, the patdown of appellant was proper based on officer safety reasons, specifically the combined factors of the high

---

5. "Although the [California] Supreme Court's discussion [in *People v. Souza*, *supra*, 9 Cal.4th at pp. 240-241] addresses the propriety of *Terry* stops, the court's conclusions apply with equal force in determining the reasonableness of *Terry* frisks. [Citations.]" (*People v. Medina* (2003) 110 Cal.App.4th 171, 177.)

crime area, the late hour, and appellant's baggy clothing. Therefore, the trial court properly denied appellant's suppression motion.

Even assuming that the patdown was not proper, respondent submits that in the alternative, the officers had probable cause to arrest appellant for the crack pipe and thus, the objects recovered from him (crack pipe, credit cards, and identification card) were recovered pursuant to a valid search incident to arrest. "An officer with probable cause to arrest can search incident to the arrest before making the arrest. [Citations.]" (*People v. Limon, supra*, 17 Cal.App.4th at p. 538; see *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 [100 S.Ct. 2556, 65 L.Ed.2d 633] ["[W]e have no difficulty [in] upholding this search as incident to petitioner's formal arrest. Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. [Citations.]"]; *In re Lennies H., supra*, 126 Cal.App.4th at pp. 1239-1240.) "Probable cause exists if 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' [Citation.]" (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1238, citing *Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527].) Probable cause "'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' [Citation.]" (*In re Lennies H., supra*, 126 Cal.App.4th at p. 1238.)

Before Officer Williams's partner conducted the patdown of appellant, the partner asked whether appellant had "anything on him that could poke him or stick him." Appellant replied, "[Y]es I have a pipe in my pocket." (See 1RT 5.) Officer Williams testified that based on his training and experience, he was aware that "pipe" meant a "crack pipe." (1RT 5-6.) At this point, *before* the

patdown of appellant was conducted, the officers had probable cause to arrest appellant for the "pipe" that appellant stated was inside his pocket. Thus, even though appellant was arrested after the pipe was recovered, the officer had probable cause to arrest appellant, and the pipe was recovered pursuant to a valid search incident to arrest. Similarly, the six credit cards and one identification card recovered by Officer Williams from appellant's pocket were recovered pursuant to a valid search incident to arrest for the pipe. For these reasons, the trial court's denial of appellant's suppression motion should be upheld.

CONCLUSION

Accordingly, respondent respectfully asks that the judgment of conviction be affirmed.

Dated: September 30, 2008

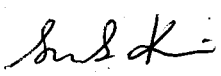
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

YUN K. LEE
Deputy Attorney General



SUSAN S. KIM
Deputy Attorney General

Attorneys for Respondent

LA2008501319
50323462.wpd

SSK:ll

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 2,842 words.

Dated: September 30, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

SUSAN S. KIM
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. Foster** No.: **B206146**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On SEP 30 2008, I placed the attached

Respondent's Brief

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Richard L. Fitzer
Attorney at Law
6285 East Spring Street, #276N
Long Beach, CA 90808 (2 copies)

Hon. John A. Clarke
County Clerk/Executive Officer
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Hon. Steve Cooley
District Attorney, Los Angeles County
Attn: Annette Peterson
Deputy District Attorney
18-709 Clara Shortridge Foltz Bldg.
210 West Temple Street
Los Angeles, CA 90012

FOR DELIVERY TO: Hon. Charles F. Palmer, Judge

In addition, I placed one (1) copy in the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery to:

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on SEP 30 2008, at Los Angeles, California.

L. Lara

L. Lara
Signature

SSK:ll
LA2008501319
9-29-08